Supreme Court, U.S.
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No. 94-

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM 1994

ESTATE OF SILVIO RAVETTI
Petitioner,

Vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE OTHER SPOUSE HAVE A RIGHT TO JUDICIAL REVIEW OVER THE GRANTING OF INNOCENT SPOUSE STATUS UNDER §6013(E) OF THE INTERNAL REVENUE CODE?

II. IS THE OTHER SPOUSE AN INDISPENSABLE PARTY IN TAX COURT LITIGATION CONCERNING §6013(E) OF THE INTERNAL REVENUE CODE?

III. IN ADJUDICATING FRANK LYON SHAM LOSS DEDUCTIONS COULD MOTIVATION BE DETERMINED AT THE PARTNERSHIP LEVEL BEFORE TEFRA?

IV. MUST THE INTERNAL REVENUE SERVICE COME FORWARD WITH EVIDENCE OR A FINDING IN THE STATUTORY NOTICE TO FIND THAT THE GENERAL PARTNER HAS FRANK LYON SHAM MOTIVATION?

V. ARE AGREEMENTS BETWEEN TAXPAYERS AND THE INTERNAL REVENUE SERVICE GOVERNED BY THE GENERAL CONTRACT LAW OF MISTAKE AND CAPACITY TO CONTRACT ?

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OPINIONS BELOW

The opinion of the Court of Appeals in #93-70852 was not published. It is attached as Appendix A. In this docket number the order of the Tax Court with respect to the innocent spouse issue was published as TCM 1989-45, it is attached as Appendix B. The opinion on the merits was published as TCM 1993-343, it is

attached as Appendix C.

The opinion of the Court of Appeals in #93-70851 was not published, it is attached as Appendix D. The order of the Tax Court refusing to grant relief from collection under Tax Court Rule 55 is attached as Appendix E. The opinion of the Tax Court on the merits was published as TCM. 1993-418, It is attached as Appendix F.

JURISDICTION

The decisions of the Court of Appeals were entered on October 11, 1995. Justice O'Connor as Circuit Justice extended the time for filing this petition until February 8, 1995. This Courts jurisdiction in invoked under 28 USC 1254.

Jurisdiction was conferred below by 26 USC 7442.

STATUTORY PROVISIONS INVOLVED

Section 6013(e) - INNOCENT SPOUSE STATUTE

(e) Spouse Relieved of Liability in Certain Cases.---

(1) In general.---Under regulations prescribed by the Secretary if---

(A) a joint return has been made under this section for a taxable year,

(B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,

(C) the other spouse establishes that in signing the return he or she did

not know, and had no reason to know, that there was such substantial understatement, and

(D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement. .....

TRANSITIONAL RULE
Section 6013(e), INNOCENT SPOUSE STATUTE

26 Section 6013

1984 Act. Section 424(c) of Pub. L. 98-369, Div. A as amended by Pub. L. 100-647, Section 6004, Nov. 10, 1988, 102 Stat. 3685, provided that :

(1) In general.---Except as provided in paragraph (2), the amendments made by subsections (a) and (b) [amending subsec. (e) of this section and enacting section 66(b), (c), redesignating as section 66(d) former (66(b), and amending headings of section 66 and 66(a) of this title] shall apply to all taxable years to which the Internal Revenue Code of 1954 applies. Corresponding provisions shall be deemed to be included in the Internal Revenue Code of 1939 and shall apply to all taxable years to which such Code applies.

"(2) Authority to disregard community property laws.--- Subsection (b) of section 66 of the Internal Revenue Code of 1954, as added by subsection (b) [section 66(b) of this title], shall apply to the taxable years beginning after December 31, 1984."

"(3) Transitional rule.---If---

"(A) a joint return under section 6013 of the Internal Revenue Code of 1954 [this section] was filed before January 1, 1985,

"(B) on such return there is an understatement (as defined in section 6661(b)(2)(A) of such Code [section 6661(b)(2)(A) of this title] which is attributable to disallowed deductions attributable to activities of one spouse,

"(C) the amount of such disallowed deductions exceeds the taxable income shown on such return,

"(D) without regard to any determination before October 21, 1988, the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such an understatement, and

"(E) the marriage between such spouses terminated and immediately after such termination the net worth of the other spouse was less than $10,000,

notwithstanding any law or rule of law (including res judicata), the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such understatement, and, to the extent the liability so attributable has been collected from such other spouse, it shall be refunded or credited to such other spouse. No credit or refund shall be made under the preceding sentence unless claim therefore has been submitted to the Secretary of the Treasury or his delegate before the date 1 year after the date of the enactment of this paragraph [No. 10, 1988], and no interest on such

credit or refund shall be allowed for any period before such date of enactment."

STATEMENT OF THE CASE

This Petition relates to separate appeals from the Tax Court on petitions for redetermination covering different taxable years for the same taxpayer. The Court of Appeals ordered them calendared together with the case of the same taxpayer verses the United States. They were assigned to the same panel of the Court which declined to hear oral argument and decided all cases the same day, October 11, 1994. CA # 93-70852 concerns the tax years 1976,1977, and 1978. CA #93-70852 concerns the tax year 1982. The years 1979, 1980, and 1981 are now before the Ninth Circuit on appeal from two separate Tax Court decisions.

All of the tax years except 1982 involve the innocent spouse judicial review issue which is before this Court by separate petition in Estate of Ravetti v United States.

The cases which are the subject of this petition both concern the substantive tax issues involved in this litigation. They both have some of the same questions presented for review. Since they were at least partially consolidated by the Court of Appeals, we thought it appropriate to join them in this petition.

As was indicated in the companion petition before this Court, the Taxpayer

and his wife filed joint income tax returns for the years 1976 - 1981. After audits the Internal Revenue Service issued joint deficiency notices for all years. They were divorced in 1982, and Mrs Ravetti received over a half million dollars in the property settlement. They filed separate petitions in the Tax Court. No notice of the wife's petition was given or required by the Tax Court rules to be given to the Taxpayer by her attorney.

Without notice to Petitioner, although notice was requested, and without an opportunity to be heard the Internal Revenue Service stipulated for the tax years 1976-1981, in three separate dockets, that Mrs. Ravetti was an innocent spouse under the provisions of 6013(e) if the Code. The Tax Court then issued a decision relieving her from any liability for the tax deficiencies in question. As we indicated in the District Court petition, as a matter of law she was not entitled to this status. Among other things, her net worth exceeded $10,000 and this disqualified her under the Transitional Rules to the amended innocent spouse statute.

We have raised the basic question of procedural due process involved in these proceedings in the companion case Estate of Ravetti v United States, and we will not cover the same ground here. In this case we discuss the fundamental question of whether in circumstances such as this the other spouse is an indispensable party to litigation relieving federal tax liability under §6013(e) in the Tax

Court.

Although CA #70852 and CA #70851 share common questions of law, and neither involved oral testimony, they had different procedural histories. CA #70851 was decided on summary judgment, and CA#70852 on stipulated facts submitted under Tax Court Rule 122. Each docket involved the disallowance of different partnership losses, but the disallowance of each was on the basis that the intent of the general partner could be imputed to the taxpayer before the partnership tax rules were enacted by Congress in 1982. Both cases also involve a disregard of basic contract law principles in agreements between the Internal Revenue Service and the tax payers by both the Tax Court and the Court of Appeals.

The Taxpayer had "presenile dementia" and was confined in a mental hospital in November and December of 1980. The questioned waiver of the statute of limitations was in April of 1981. The stipulated statement of the treating physician established the condition existed in all the tax years before the Court. He was declared incompetent by the California Courts in 1985 and died of Alzheimer's disease in 1986.

CA #70852 concerned the tax years 1976-78. Two investments were disallowed as shams under the rules of Frank Lyon Co. v United States 435 U. S. 561; 98 S.Ct 1291 (1978). One involved coal limited partnerships and individual coal

lease investments, and the other was an investment in a movie.

The promoter and general partner in the coal cases was a thief. He was indited for security fraud in connection with these transaction. In the Ninth Circuit decision in U. S v Crooks (9th Cir) 884 F2d 1441 he was described as a check kiter who did not have coal leases at all. In the movie investment which had an all star cast including John Carradine, Kurt Jurgens, and Peter Graves the general partner was not identified. The cast were paid on a contingent basis, Unfortunately, there was a loss.

Both the Tax Court and the Ninth Circuit held that the intent of the general partner controlled for the purpose of determining whether the transaction was motivated by economic substance outside of tax considerations, and in neither investment had the Taxpayer proved that the general partner was not solely motivated by tax considerations. However, the Tax Court in CA# 93-70852 refused to penalize the Taxpayer for a tax motivated transaction on the grounds that the Service had failed to prove it.

The statute of limitations would bar liability in CA93-70852 unless a valid waiver was executed by the Taxpayer. Since the stipulated statement of the treating physician established that he was suffering from dementia, under well established contract principles no valid waiver could have been executed, since the Taxpayer was incompetent to execute

one.

CA# 9370851 involves the bizarre situation of collection before trial in a docketed Tax Court case in violation of §6213(a). The issue involves a stipulation between I. R. S. District Counsel and the Attorney for the Taxpayer. In that connection Counsel wrote the attorney for the service agreeing to stipulate to the merits of the oil investment, but reserving the right to defend on the basis of the special defenses unique to the Taxpayer as follows:

> These defenses which in the main involve the late Mr. Ravetti's mental incompetency include the statute of limitations, profit motivation, imputed intent before TEFRA, theft loss deductions and the innocent spouse issue which is presently before the Ninth Circuit."

The stipulation between attorneys allowed special defenses, did not mention a dollar amount, and did not contain any reference to a waiver of restrictions on collection. However, in a purportedly parallel document to be signed by the petitioner a waiver was included in the other stipulations executed by the lawyers. After collection effort commenced, Mr. Kinghofer the district counsel involved was contacted and advised that the waiver had been included by mistake.

However, higher authority in the Service refused to modify the agreement.

Petitioner then rescinded the stipulation on which the judgment of the Tax Court is based. After a motion under Tax Court Rule 55 to restrain collection, the Tax Court and the Ninth Circuit held that this agreement was written in stone, and refused to allow the recision.

In its motion for summary judgment the Service introduced no facts except the stipulation. It did not identify the general partner. No finding was made with respect to the partnership and the general partner was not even identified in the statutory notice. The Ninth Circuit held the burden was on the Petitioner to prove that the investment was not solely tax motivated at the general partner level, and the Taxpayer's motivation was immaterial.

We realize this is a petition for certiorari and the Court is not in the main concerned with the justice of the petitioners treatment below, but we cannot help but comment on the sorry treatment this taxpayer received below, both judicially and administratively.

The first petition to the Tax Court in this matter was filed in 1982. The Tax years date back to 1976, almost twenty years ago. The Taxpayer is dead, as is his ex wife, as are most of the potential witnesses. No continuance was ever granted the Petitioner, and motions to consolidate the cases by Petitioner were denied three times. Facts stipulated in one case are ignored in the other. For example, the principle ground for rejecting the stipulated fact that

Ravetti was demented in the first Tax Court case was the absence of the raw medical records. These records are included in the second case. In regard to a theft deduction for the coal investment promoters the IRS refused to name a year of discovery, despite the fact that audits, indictments, and convictions all took place within the period from 1976 to 1982 all of whose tax years were before the Tax Court in one docket or another. In one of the Tax Court dockets still before the Ninth Circuit there is a stipulation which establishes that the Service was informed of Ravetti's alzheimer's disease before waivers of the statute of limitation were executed. This information was disregarded by the service.

Counsel for the Service at one time totaled seven, and stretched geographically from Idaho to Los Angeles, and a number of points in between. This Court will note at least four different Judges in the Tax Court on in the opinions supplied in the Petitions. There were at least four more.

All this took place because what the Tax Court and the Service calls "special projects" were involved. This caused, because they overlapped years, multiple government counsel in the same case. It probably led, because of the form documents involved, to the mistake which caused premature collection. In denying the normal right to try related cases together, the Court allowed the Service to ignore in one docket facts stipulated in the other.

Below we raised the question whether refusing to consolidate these cases was such a depravation of substantive right as to require reversal. We would not presume to ask for Supreme Court review on such a ground. However, if review is granted on grounds of more national importance, perhaps, the rights of this taxpayers estate could be taken into account in the future disposition of the case.

REASONS FOR GRANTING THE WRIT

The principal ground for granting the writ is the denial of meaningful judicial review by granting innocent spouse status without allowing the person most directly concerned to object. Estate of Ravetti v U. S. represents the attempt to obtain review in the District Court, this case deals with an attempt in the Tax Court. Having both cases before the Court gives a unique opportunity to examine the problem from both planes of reference.

Each Court has problems in dealing with this question. The Tax Court with Comm. v Gooch 64 S. CT 184 and the District Court with the Anti Injunction Act. We submit, however, that there must be federal judicial review in one of them on this question of federal tax law to satisfy the Constitution. The national importance of this question is self evident, and for this Court as with the Court below the case is one of first impression.

The merits of these cases should be considered also. These cases arose before TEFRA, and the effective date of the regulation implementing the assigning of profit motivation to the partnership level. Furthermore, imputing a motivation which forfeits even "at risk" deductions to a taxpayer when the check kiting promoter general partner obtained their money by fraudulent misrepresentation defies common sense.

The refusal of the Tax Court and the Court of Appeals to apply the basic contract principles of mistake and capacity to contract in agreements between taxpayers and the Internal Revenue Service should be reviewed. In this connection these cases are in direct conflict with the case of Flynn v U. S.(3Cir) 786 F2d 586(1986). In both administrative law and when the federal courts are directly involve, attorneys should be able to trust government agencies not to take advantage of mistakes which while they benefit the government were not in the contemplation of the parties. Nor should they be allowed greater latitude in dealing with incompetents than private individuals. While this Court has upheld and stated these principles many times, the importance of the sanctity of agreements between citizens and their government requires constant admonition from this Court. Of the many duties of the Supreme Court, this one may be the most important.

1. THE TAX COURT SHOULD HOLD THE OTHER SPOUSE AN INDISPENSABLE PARTY IN

LITIGATION CONCERNING §6013(e)

In the 1855 case of Shields v Barrow 58 U.S. 130, long before the rule was codified in Rule 19 of the Federal Rules of Civil Procedure, this Court defined indispensable parties for the purposes of federal litigation.

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

This principle was not limited to what was then the equity side of the courts. Barney v Baltimore City 73 U. S. 280 (1867); See Federal Practice and Procedure, Wright et al §1601. It may well be that in Tax Court litigation the requirement in cases of this nature is so fundamental as to be a requirement of due process, regardless of equity powers.

A joint return is unique, not to speak of the association of man and wife. Partnership returns are simply conduits. In the other situations cited below the taxpayer affected has a right of federal judicial review of his own case. Here, as a practical matter Mrs. Ravetti's status has been finally adjudicated. Questioning that status in state court without congressional action conferring state court jurisdiction would be useless.

The Government could have joined the cases under Tax Court Rule 60, but chose not to do so. In "good conscience" the Tax Court could have required them to do so. It could have done so by adjudicating the right in Petitioner's case. Furthermore, disregarding our inquiry was not fair or proper of government counsel.

We recognize that some might argue that this would be the exercise of the equity power. However, splitting jurisdiction with the District Court has other serious problems, including the inhibitions on tax jurisdiction discussed by Judge Jensen in the District Court. In Flora v U. S 362 U.S. 145, 80 SCt 630, 4 L.ed 2d 625 (1960) this Court emphasized that in income tax matters it was the intent of Congress to give as broad a jurisdiction as possible in preference to the exercise of jurisdiction in the District Court. In Laing v U.S 423 US 161, 46 LEd2d 416 96 SCt 473 the Court also said that it is not to be presumed that Congress did not in tax matters intend the Tax Court not to have jurisdiction. Only the Supreme Court has the power of court supervision to find the proper answer, and it should do so.

2. THE LOWER COURTS HAVE MISAPPLIED FRANK LYON IN ADJUDICATING ALLEGED SHAM LOSS DEDUCTIONS

The investment losses in the Tax Court cases were all disallowed as shams under the rule of Frank Lyon supra. This rule involves a two part test. That is, a transaction is a sham if (1) it is not motivated by any economic substance

outside of tax considerations and (2) is without economic substance because no real potential for profit exists.

The consequence of disallowance on this ground is that a taxpayer loses his deduction not only for those amounts which were not at risk, unassumed mortgage depreciation and the like, but all amounts which were "at risk" including his out of pocket cash payments. In a practical way this amounts to a penalty or forfeiture without the burden of proof required in fraud cases.

We question in this petition the lower Courts' interpretation of the burden of coming forward with evidence, and the burden of proof in Frank Lyon sham cases. We also question whether the motivation of the general partner instead of the taxpayer should be considered by the courts in such cases. Particularly, before the effective date of TEFRA.

a) IMPUTING THE INTENT OF THE GENERAL PARTNER TO THE TAXPAYER BEFORE TEFRA IS IMPROPER

The Ninth Circuit in imputing the general partners intent to the taxpayer relied on the Tax Court's case of Hawley v Comm. TC Memo 1988-77 and its own cases Independent Electrical v Comm. (9 cir) 781 F.2d 728. These are part of a series of cases commencing in the early eighties that first the Tax Court and the then the Courts of Appeals began disregarding the motivation of the taxpayer and deciding that the motivation of the promoter, general partner should control in

declaring an investment a sham. (Although most cases at least made an attempt to set forth evidence that the taxpayer had similar tax avoidance ideas.)

In this case the matter was taken to extremes since the promoter general partner was a thief and the taxpayer was incompetent. These rulings had the commendable aim of controlling abusive tax shelters, however there was no statutory warrant for doing so until the enactment of TEFRA in 1982.

The actual statute applicable to our case is §6231 (a) (3) which reads as follows:

> **Partnership item**--The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partners level. Emphasis added

The regulation necessary to implement the statute is §301.6231(b) which reads as follows:

> **(b) Factors that affect the determination of partnership items.** The term "partnership item" includes the accounting practices and the legal and factual determinations that

> underlie the determination of the amount, timing and characterization of items of income, credit , gain, loss, deduction, etc Examples of these determinations are:.....whether partnership activities have been engaged in with the intent to make a profit.....Emphasis added

The statute was enacted in 1982 and the regulation in 1986. Regulation §301.6231(d) of the regulation provides that "This section shall apply with respect to partnership taxable years beginning after September 3, 1982." Our years are 1976,1977,1978 and 1982.

Taxation is a creature of statute and adjudicating profit motivation at the partnership level was not authorized for our years. The report of the conference committee makes clear that the Congress thought it was changing the law when it adopted this statute in TEFRA. The wide spread use of this doctrine without congressional sanction should be reviewed. Particularly, where the general partner was a thief, his intent should not be attributed to the demented incompetent taxpayer. Congress has provided in §465 and other sections adequate control of abusive tax shelters, some which apply to these years.

b) THE BURDEN IS ON IRS TO COME FORWARD WITH EVIDENCE OR AT LEAST A STATUTORY NOTICE FINDING THAT THE GENERAL PARTNER HAD FRANK LYON MOTIVATION

In none of the three partnerships whose losses were disallowed was there a finding as to the motivation of the general partner in the statutory notice. In the movie and the oil partnership the general partner was not even identified. The Court below simply held that the burden was on the taxpayer to identify and prove the general partners intent was not to avoid taxes. In other words, the taxpayer must prove a negative, and mere accusation by issuing a statutory notice with a dollar amount, casts the burden on the taxpayer to come forward with evidence which shows the Tax Court and the Service were " clearly in error".

This would not seem to be in accord with this Court's ruling on a similar issue in Comm. v Groetzinger 107 S.Ct 980 (1987) where the Court held that questions of the legitimacy of a business when reviewed by appellate courts are questions of law not of fact. See p987, 988 Sct.

In the Court below we questioned the statutory notice since no findings with respect to the partnership or the general partner were made in CA #70851. We relied on the 9th Circuit case of Scar v Comm (9th Cir) 814 F2d 1363. There the Court held that in order for a statutory notice to have the force of a presumption there must be an official finding, not a mere accusation. In both cases below, in the case of the movie and oil investments, the statutory did not even identify the general partner. In neither case did the Service introduce any evidence, other than to state the losses, to prove the

general partners motivation or to establish that the investments were illegitimate or a sham.

Under the principles of Frank Lyon and Groetzinger this case should be reviewed and the Service and lower courts advised that more than an accusation must be made to cast more of a burden on a taxpayer than to prove that he invested in what to him reasonably appeared to be a legitimate business.

3. AGREEMENTS BETWEEN TAXPAYERS AND THE INTERNAL REVENUE SERVICE SHOULD BE GOVERNED BY GENERAL CONTRACT LAW PRINCIPLES

Both cases in this petition involve stipulations, in neither did the Tax Court evaluate the testimony of witnesses. The Service did not question that Ravetti had presenile dementia or that he was confined in a mental institution approximately four months before the waiver. There has never been a question of malingering, and the taxpayer should have laid any question to rest by dying of the disease. The Service could have called the Doctor if they had doubt but they did not. They could have introduced the medical records in CA #70852 if they wanted to but they chose not to do so. In CA#70851 they could have challenged our statement that the attorney for the government who drafted the stipulation conceded that collection was allowed in the taxpayers document by mistake. They chose not to do so. They could have challenged our statement in

the Rule 55 motion that the Services stated motivation for collection was to deny administrative expense funds including attorney's fees for this case. They chose not to do so. We submit that their failure was because the fact we allege are true.

This Court has recognized the principle of mistake in contract law since the 1879 case of First National Bank v Hall. Flynn V U. S. supra recognizes that parol evidence is admissible to prove that a waiver of restrictions on assessments is invalid, and is in direct conflict with this case. The Court there applied general contract law, this Court should accept review, and reestablish the principle that Internal Revenue has no greater rights than private litigants do in agreements with taxpayers during either the administrative process or in cases in the courts. It is also possible that the Court might want to suggest that the Internal Revenue Service as representative of the Sovereign might be held to an even higher standard in agreements with the nation's citizens.

CONCLUSION

The Ninth Circuit's depravation of judicial review should not be allowed to stand. Nor should the attribution of profit motivation to the general partner which is being made by the lower courts before Congressional authorization. Still less should the Court allow seizure of taxpayer assets in cases in the Tax Court to give the Internal Revenue an edge in

the conflict.

This case as it stands represents in its published version an abandonment to the Internal Revenue Service the field of domestic relations. In its unpublished version, in a practical sense, it abandons the field of sham losses to the agency. The loss deduction for trade or businesses authorized by Congress will be at the mercy of the Service. This case is an extreme one, and the administration of the tax law will be aided by the Court restating that the basic right to fair treatment and constitutional procedure applies even in tax cases.

Dated: February 7, 1995

Respectfully Submitted,

Richard H. Foster

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF SILVIO RAVETTI, Deceased, Donna Irene Logan, Executrix,	)	No. 93-70852
Petitioner-Appellee,	)	Tax Ct. No. 26617-82
V.	)	
COMMISSIONER, INTERNAL REVENUE SERVICE,	)	MEMO-RANDUM*
Respondent-Appellee.	)	

Appeal From A Decision of the United States Tax Court

Submitted October 3, 1994**
San Francisco, California

Before: GOODWIN, O'SCANNLAIN and KLEINFELD, Circuit Judges.

We affirm the Tax Court decision.

Ravetti challenges his waivers of the statute of limitations, on the basis of his claimed incompetency when he signed them. This contention fails

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

because the burden of proof was on Ravetti to prove his incompetence, Roberto v. Aquon, 519 F.2d 754, 759 (9th Cir. 1975), and we review the Tax Court's determination that he was not only for clear error. Independent Elec. Supply, Inc.v. Commissioner, 781 F.2d 724 (9th Cir. 1986). Ravetti's only evidence for his incompetence was Dr. Krause's report that when he diagnosed Ravetti in November-December 1980, Ravetti suffered from "presenile dementia, probably Alzheimer's disease, early." This evidence is especially weak because the medical history and discharge summary, which Dr. Krause referred to in his affidavit, wee not attached. Dr. Krause thought Ravetti was at an "early" stage of the disease, which cuts against the inference that he was already incompetent. Appointment of a conservator apparently based on his incompetence, did not take place until five years later, in 1985. Combined, the evidence allows for a rational inference that Ravetti was incompetent shortly before and after his 1980 hospitalization. But it does not compel those inferences. Ravetti signed the waivers 11 months before and 8 months after the hospitalization. Given this slim evidentiary record, the Tax Court could reasonably refuse to draw the inference that Ravetti had proved it more likely than not that he was incompetent at the relevant times.

The Estate appeals disallowances of the deductions and credits arising out of

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** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

the coal tax shelter, on the ground that the Comissioner did not prove that Ravetti's motivation was to avoid taxes rather than to invest in a genuine business. But Ravetti's motivation did not matter. The Estate and the Commissioner "agree[d] to an incorporate[d] as part of [their] stipulation, all findings of fact and legal opinions reached by the Tax Court in Hawley v. Commissioner, T.C. Memo 1988-77." (Stipulation of Facts Paragraph 12). In Hawley, the general partner was found to lack a profit motive. Id. The law before and after 1982 requires determining the profit motive of a partnership at the partnership level. Wolf v. Commissioner, 4 F.3 709, 713 (9th Cir. 1993). Since the shelter's general partner lacked a profit motive, Ravetti's deductions were properly disallowed.

The Estate argues that it should be allowed a theft deduction for the coal tax shelter, because the seller of the investment defrauded Ravetti. But he did not claim a theft deduction on his return, establish when he discovered that he had been defrauded, 26 U.S.C. Section 165(e), or establish how much money he had lost to the theft (a different calculation from the deductions and credits attributable to the investment). The theft deduction, if one were allowable under Nichols, would likely be for a smaller amount of money and a different year. It was Ravetti's burden to claim the deduction and, if it were challenged, to prove his entitlement to it. Boehm v. Commissioner, 326 U.S. 287, 294 (1945). He did not carry this burden of proof.

The Estate argues that the

deductions based on the movie tax shelter were wrongly disallowed, because the movie appears to have been a bona fide attempt to make a profitable film. The Estate argues persuasively that the use of an established producer and big-name stars show that when the movie was made, it was not a sham created just t be a tax shelter. But Ravetti did not invest in the movie at that time. He invested later. The movie was made for $4000,000 by Noble Productions, immediately sold for $113,000 by Noble to 21st Century Film Management Corporation, which then quickly sold the film to C & M's tax shelter promoter for $1.5 Million. When C & M bought the movie, the price was $150,000 cash, a recourse note for another $150,000, and a non-recourse note for $1.2 million. This type of financing, when combined with a significantly inflated purchase price, is one of the hallmarks of a sham investment. Independent Elec. Supply, Inc. v. Commissioner, 781 F.2d 724, 727 (9th Cir. 1986). Gross receipts from the film were $7,802. Ravetti invested in C & M, not in Noble Productions. Ravetti's estate therefore had the burden of proving that C & M's, not Noble Productions's, investment in the film was not a sham. The figures, financing, and limited exhibition support the Tax Court's determination that the sole motivation of C & M's investment, although not Noble Production's, was to produce tax credits and deductions, not profits. That determination was not clearly erroneous.

AFFIRMED.

T.C. MEMORANDUM OPINION
1989 - 45

UNITED STATES TAX COURT

ESTATE OF SILVIO RAVETTI, DECEASED,

Petitioner

v

COMMISSONER OF INTERNAL REVENUE

Respondent

Docket No. 2913-87.
Filed January 30, 1989

Richard H. Foster, for the petitioner

Donna Rice Owens, for the respondent

MEMORANDUM OPINION

NAMEROFF, Special Trial Judge: This case was assigned pursuant to section 7443A(b)(4) and Rules 180, 181, and 182.[1]

On September 16, 1988, petitioner filed a motion to amend and supplement its timely filed petition of February 2, 1987. The motion was accompanied by a

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[1] Section references are to the Internal Revenue Code of 1954, as amended, and in effect during the tax years at issue unless otherwise indicated. Rule references are to the Tax Court Rules of Practice and Procedure.

proposed Amended and Supplementary Petition, a Declaration by petitioner's attorney, and a Memorandum of Law in Support of the Motion to Amend the Petition. The motion states that respondent objects to the filing of the amended petition. The proposed amended petition asks this Court to find that respondent violated petitioner's due process rights by granting "innocent spouse treatment" to Silvio Ravetti's ex-wife, Martha Ravetti, without providing petitioner notice or the opportunity to be heard.

On November 6, 1986, respondent issued a joint notice of deficiency to petitioner and Martha Ravetti, determining deficiencies for 1979 and 1980 in the amounts of $114,255.64 and $178,738.60, respectively. In addition, the Commissioner determined additions to tax under section 6653(a) in the amount of $5,713.00 and $8,937.00, respectively.

Martha Ravetti filed a separate petition with this Court at docket no. 2750-87 with regard to these years. On May 6, 1988 this Court entered its decision in that case, pursuant to the agreement of the parties thereto, to the effect that there are no deficiencies or additions to tax due from Martha Ravetti for 1979 and 1980 by virtue of section 6013(e). The proposed amended petition contends that the respondent's actions in docket no. 2750-87 deprived petitioner of its right to contribution for the joint and several tax liability incurred from the jointly filed returns. The proposed amended petition further contends that respondent's failure to notify petitioner of the decision to grant Martha innocent

spouse treatment constituted a violation of procedural due process.

Rule 41(a) provides: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served.***Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party***" The answer was served in this manner in April 1987. Consequently, leave of Court is required to amend the petition since respondent objects to the proposed amendment. Rule 41(a) further provides that leave to amend "shall be freely given when justice so requires."

In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court stated that leave to amend may be inappropriate where there is "any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." - for denying it. If permitting an amended pleading would be futile, it is within the discretion of the Court to refuse to grant leave to file the amendment. See Jafree v. Barber, 689 F.2d 640, 644 (7th Cir. 1982); Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983). Under the facts of this case, we believe it would be beyond our jurisdiction, as well as futile and inappropriate for this Court to rule on the constitutionality of respondent's action with regard to Martha Ravetti or

any claim by petitioner for contributions.

When a husband and wife elect to file a joint income tax return, they become jointly and severally liable for the entire tax payable upon the aggregate income. Furnish v. Commissioner, 262 F.2d 727, 731 (9th Cir. 1958). Accordingly, respondent had the option of proceeding against each of them jointly or severally. Garfinkel v. Commissioner, 67 T.C. 1028 (1977); Dolan v. Commissioner, 44 T.C. 420 (1965). When separate petitions are filed, each case is regarded as a separate case, and the parties in each separate case are subject to only their opponent's claim and defenses. Settlement between a docketed taxpayer and respondent is common, notwithstanding the possibility that a related taxpayer may be waiting in the wings to try his case which involves the same transactions. Even if several parties were to have their cases consolidated for trial, briefing and opinion, there is nothing to prevent respondent from settling with one or more of the consolidated parties, perhaps to the detriment of the remaining parties.

More importantly, this Court is a court of limited jurisdiction. We can only redetermine a deficiency or overpayment with respect to the taxpayer before us; we have no jurisdiction to make any finding as to a third party. IN the instant case, notwithstanding the fact that Martha Ravetti was a party in another docket, she is a third party in this docket and we could not fashion any finding or determination as to her.

If respondent violated some

constitutional right of petitioner in settling the case with his ex-wife, that action would not affect our jurisdiction to redetermine the deficiencies and additions to tax due from petitioner for 1979 and 1980. We could not, for example, determine the liability to be less than the correct tax due on the correct taxable income by reason of those actions. To do so would be exercising equity jurisdiction, which we do not have. If respondent violated some constitutional or civil right of petitioner, (and we make no comment whatsoever on this matter) petitioner's remedy might be to seek some sort of redress in Federal District Court.

It is clear to us that petitioner's concern here is its right of contribution from the joint filer. The Internal Revenue Service Code has no provision dealing with such an issue. Contribution is a matter to be resolved under the state laws. For example, California Civil Code, section 1432 (West. 1982), provides: "A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." This rule applies even though there has been no contract between the payor and the person benefited. Murchinson v. Murchinson, 219 Cal.App.2d 600, 33 Cal. Rptr. 285, 287 (1963). Consequently, when a party pays the full amount of a tax obligation, a new cause of action for contribution may arise by operation of state law in favor of that party against those sharing the joint and several tax liability. See Murchinson,

supra, at 288.[2] Petitioner therefore would have to proceed in the California court system to determine what contribution rights it now has. Again, this Court does not have such jurisdiction.

Accordingly, petitioner's motion to amend and supplement its petition will be denied.

An appropriate order will be issued.

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2 However, paragraph 3 of the Stipulation and Order Amending Interlocutory Judgment of the Dissolution of Marriage, filed in the Ravetti's divorce proceeding provides that the parties thereto shall be equally liable for the tax liabilities unless Martha Ravetti "be judicially determined to be an 'innocent spouse' in relationship to any said tax assessment..."

T.C. Memo. 1993 - 343

UNITED STATES TAX COURT

ESTATE OF SILVIO RAVETTI,
DONNA IRENE LOGAN, EXECUTOR,
Petitioner v. COMMISSIONER OF
INTERNAL REVENUE, Respondent

Docket No. 26617-82.
Filed August 3, 1993.

P invested in a limited partnership (Harding) which was involved in coal mine leases. On his income tax return for 1976, P deducted, as a loss, a $48,315 loss attributable to Harding's operations. P claimed, in the alternative, a theft los in regard to Harding. P also invested in a limited partnership which purchased a motion picture. In regard to this investment, P deducted $19,195 as an ordinary loss and claimed investment tax credits of $13,650

for the tax year 1978. P Asserted the statute of limitations as a bar against respondent in regard to the tax years 1976 and 1977. Held:

1. P failed to demonstrate any defects in the waiver of period limitations. Deficiencies for 1976 and 1977 are not barred by the statute of limitations.

2. As a result of P's stipulation agreeing to all findings of fact and legal conclusions in Hawley v. Commissioner, T.C. Memo. 1988-77, P may not deduct $48,315 as a loss in the operations of Harding.

3. P fails to satisfy the criteria of sec. 165, I.R.C.; as a result, P is not entitled to a theft loss deduction in regard to his investment in Harding.

(2) Whether petitioner is entitled to deductions amounting to $48,315 attributable to his interest in a Cal-Am limited partnership for the tax year 1976.

(3) Whether, in the alternative, petitioner is entitled to a theft loss with respect to his investment in a Cal-Am partnership.

(4) Whether petitioner is entitled to ordinary deductions of $19,195 and investment tax credits of $13,650 attributable to his interest in the C & M limited partnership and claimed on his 1978 tax return.

(5) Whether petitioner is liable for an addition to tax pursuant to section 6651(a) for the tax year 1976.

(6) Whether petitioner is liable for additional interest at the rate provided in section 6621(d) for 1976.

Respondent disallowed deductions for

payment of advanced coal royalties in 1977 and 1978 in the amounts of $171,500 and $67,500, respectively. On brief petitioner fails to pursue this issue and is presumed to have abandoned it.

Background

This case was submitted fully stipulated. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Silvio Ravetti (Ravetti) resided in California at the time he filed his petition. He died during the course of this dispute, and pursuant to an order of this Court "Estate of Silvio Ravetti, Donna Irene Logan, Executor," was substituted as petitioner (petitioner).

In 1950, Ravetti married Martha Ravetti. They were divorced in 1982. During the years at issue they filed joint income tax returns. Martha Ravetti filed a separate petition, which was assigned Docket No. 27142-82, and is not a party to this case.

An order appointing a conservator for Ravetti was filed on February 4, 1985. The Order Appointing Conservator states that Ravetti was unable to provide for his personal needs and was substantially unable to manage his financial resources or resist fraud of undue influence.

Harding Company was a limited partnership promoted and sold by the Cal-Am Corporation in 1976. It was one of 296 similar Cal-Am Coal Tax Shelter Partnerships. On his 1976 return Ravetti

deducted $48,315 as a loss attributable to the operations of Harding.

In the Stipulation of Facts it is stated that "Petitioner and respondent agree to and incorporate as a part of this stipulation, all findings of fact and legal opinions reached by the Tax Court in Hawley v. Commissioner {Dec. 44,602(M)], T.C. Memo. 1988-77." Harding was one of the 296 Cal-Am coal tax shelter partnerships involved in the Hawley case.

The parties further stipulated that all 296 Cal-Am partnerships were identical, except for the following items: The dollar amounts involved; the presence of Black Rock in some cases or [International] Coal in others as the lessor of the coal lease; the presence of Joseph Laird in some cases or Kenneth Fisher in others as the individual general partner; the presence of Cal-Am Corporation in some cases or Dixie Natural Resources in others as the corporate general partner; and the description of the geographical location of the coal referred to in the leases.

Respondent and petitioner also stipulated that during the Hawley trial, Joseph Laird, in his capacity as general partner of Harding, made the following admissions: That the Cal-Am partnerships were not intended to become involved in the actual mining of coal; that the CalAm partnerships never intended to finance any mining operations; that the partnerships had no obligation to mine coal and no sale of mined or recovered

coal took place; that the net amount of cash received from the limited partners in the 1976 Coal Tax Shelter program was $25,000,000 and that the partnerships had no right to this money; that the funds were controlled by Joseph Laird and used by him to purchase a motion picture studio, a hotel, 152 condominiums, four Convair airplanes, one small jet, and some mining equipment; that Joseph Laird did not consider the multiple costs involved in mining noncontiguous properties which were acquired for the partnerships; that no one associated with Joseph Laird was sufficiently skilled to develop a mining program; that neither Joseph Laird nor Kenneth J. Fisher, as general partners, contributed to the development of the coal leases; and that Joseph Laird neither believed it necessary nor did he or any of his associates assure the limited partners of making a profit.

Lastly, petitioner and respondent agreed to be bound by the opinion of the United States Court of Appeals for the Ninth Circuit in the United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986). That case involves, in part, Joseph Laird's appeal of his conviction for defrauding the United States, aiding in the filing of false tax returns, and filing false tax returns.

Cruise Missile, Ltd. (C & M) was a California limited partnership organized in 1979. Its general partner was Film Services Corp. (Film Services), a California corporation. Film Services solicited the sale of C & M limited

partnership interests in a private offering calling for a purchase price of $150,000 for each of ten units offered. Ravetti purchased one such unit.

The purchase price of each unit was payable by $15,000 cash in 1978, a note for $15,000 due on December 31, 1979 and a second note for $120,000 due on or before December 31, 1985. The $120,000 note was payable only from film rental proceeds and could be renewed indefinitely for periods of seven years.

Each unit entitled the investors to 10 percent of the profits and losses of the partnership. In addition, the limited partners received a 75-percent interest in the capital of the partnership. The general partner was not required to contribute any capital to C & M and was not a participant in C & M's profits and losses. The general partner was, however, entitled to a 25-percent interest in capital and a management fee equal to 3 percent of the partnership's cash flow.

C & M was formed for the purpose of purchasing a feature length motion picture originally entitled "Cruise Missile" (film). C & M purchased the film from 21st Century Film Management Corporation (21st Century) for a total purchase price of $1,500,000. This amount was payable as follows: $150,000 in cash before December 31, 1978; $150,000 by a short-term note due on or before December 31, 1979; and $1,200,000 by a note payable December 31, 1985. The note for $1,200,000 was payable only out

of the proceeds received from rentals of the film.

Executed simultaneously with the purchase of the film rights was an agreement requiring C & M to aid in the purchase of release prints of the film by providing up to $160,000 in cash or notes. C & M executed a similar agreement which required it to provide up to $200,000 in cash or notes to be applied toward advertising the film. Pursuant to these agreements, C & M executed a note for $155,000 payable on or before December 31, 1985, in favor of Ora Advertising and Marketing (Ora Advertising) and a second note for $200,000, also payable to Ora Advertising. Both of these notes were payable only out of film rental proceeds and were renewable indefinitely in 7-year intervals.

At the time the limited partners acquired their interests, they executed guaranty agreements for their proportionate shares of the $1,200,000 partnership note in favor of 21st Century, as well as their proportionate shares of the $200,000 note in favor of Ora Advertising. In this manner, each partner guaranteed $140,000 of C & M's liabilities.

The film purchased by C & M was produced by Noble Productions, Inc. (Noble) in co-production with several foreign producers. Noble's costs approximated $400,000, excluding contingent compensation arrangements with the actors. The film was primarily shot

in Iran and France. Once the film was completed, Noble assigned all U.S. and Canadian (except French Canada) rights in the film to 21st Century for a total consideration of $113,000.

The film starred Peter Graves, Kurt Jergens, Michael Dante, and John Carradine. It received its first U.S. booking on December 7, 1979 at the Carri Theatre in Florence, Alabama. Only three other bookings, one each in Georgia, Iowa and Texas, were secured thereafter. Box office receipts for the film totaled $1,062. Non-theatrical showings of the film through January, 1981, grossed approximately $6,740. None of these proceeds ever reached the partnership since the proceeds were first applied against marketing and other promotional costs, including commissions of the distributors.

All distribution rights for the film were assigned by 21st Century to Ika Panajotovic, the film's producer and sole owner of Noble. For the years 1978 and 1979, C & M filed U.S. partnership returns showing the following amounts of income and net losses:

	1978	1979
Gross Receipts	$ -0-	$ -0-
Interest Income	-0-	4,216
Less: Depreciation	(83,332)	(500,000)
Net Loss	(83,332)	(495,784)

Interest income reported by C & M for the 1979 year represents interest paid by the limited partners on the portion of their

capital investment, which was deferred by the note payable in 1979.

C & M computed depreciation expenses of the film on the straight-line method over a useful life of three years. The basis of the film claimed for purposes of depreciation was $1,500,000. For the year 1978, the partnership used a basis of $1,895,500 for purposes of computing an investment tax credit.

Petitioner concedes all adjustments related to an entity known as the Spring Valley Partnership. Petitioner also concedes all adjustments proposed by respondent regarding contribution deductions for 1977 and 1978. The parties also agree that the adjustments to medical expenses determined by respondent are computational and will be redetermined based upon our resolution of the issues.

Discussion

On brief, petitioner argues that a decision in this case should not be reached until the Court of Appeals for the Ninth Circuit decides whether petitioner is entitled to equitable relief from Martha Ravetti's settlement agreement with respondent. Petitioner, however, fails to advance any adequate grounds or persuasive arguments as to why we should continue this case.

On November 18, 1988, petitioner moved to amend and supplement the petition in this case to include the issue of equitable relief. We denied

that motion on December 12, 1988. Consequently, this issue is not properly before us, and petitioner's discussion of it on brief is inappropriate.

We focus first on whether respondent is time barred from assessing taxes and additions to tax for the years 1976 and 1977. Petitioner argues that, although valid on their face, certain consents to extend the limitations period are invalid because at the time Ravetti executed them he was laboring under a mental defect, specifically Alzheimer's disease. Petitioner asserts that since contract principles generally apply to such written agreements, a consent to extend the time to assess tax executed by an incompetent is invalid and unenforceable.

The record contains a Form 872, Consent to Extend the Time to Assess Tax and two Forms 872A, Special Consents to Extend the Time to Assess Tax. Form 872 relates to 1976. It was executed by Ravetti on December 19, 1979, and by respondent on January 11, 1980, and extended the assessment period to December 31, 1981. Ravetti filed his return for 1976 on June 21, 1977. Thus the 3 year period of limitations did not expire prior to the time Ravetti and respondent executed Form 872.

The first For 872A also relates to 1976. It was executed by Ravetti on August 15, 1981, and by respondent on August 25, 1981. Consequently, it was executed prior to the expiration of the period for assessment of Ravetti's 1976 liability as extended by Form 872. The

second Form 872A relates to tax year 1977. It was executed by Ravetti on April 24, 1981, and by respondent on May 11, 1981. Since Ravetti filed his return for 1977 on September 18, 1978, this consent was executed within the period of limitations for assessing Ravetti's 1977 tax liability. By their terms, Forms 872A extend the time to assess tax to a date on or before the 90th day after:

(A) The Internal Revenue Service Office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s), or (B) The Internal Revenue Service mails Form 872-T to the taxpayer(s), or (C) The Internal Revenue Service mails a Notice of Deficiency for such periods.***

Forms 872A further provide that if a notice of deficiencies sent to the taxpayer, the time for assessing the tax will end 60 days after the period during which the making of an assessment was prohibited. In this case, respondent mailed the notice of deficiency for tax years 1976, 1977, and 1978 to Ravetti on August 13, 1982.

The parties stipulated a copy of a declaration dated May 19, 1988, given in a State Court proceeding by Stephen Krause, M.D., Director of McAuley Neuropsychiatric Institute at St. Mary's Hospital in San Francisco, California. In the declaration Dr. Krause states that he was Ravetti's psychiatrist from late 1980 until early 1982; that Ravetti was admitted to McAuley on November 10, 1980, and discharged on December 5, 1980. Dr.

Krause diagnosed Ravetti's condition as "A. Presenile dementia, probably Alzheimer's Disease, early;" and "B. Major depressive episode, agitated, secondary to diagnosis A." Dr. Krause states that a person suffering from this disease is likely to have memory impairment, poor judgment, and continued paranoia, and that this disease "could have" had an effect on his business behavior since as early as 1976.

The copy of Dr. Krause's declaration refers to two exhibits, namely, Ravetti's medical history and "physical" at the time of his admission to McAuley, and his discharge summary. Neither exhibit is included with the copy of the declaration which the parties stipulated.

Dr. Krause's declaration, given for some unstated purpose in another case, is insufficient to establish Ravetti's mental incompetence on the dates he signed the three waivers, namely December 19, 1979, April 24, 1981, and August 15, 1981. The mere fact that Ravetti was under the care of a psychiatrist is insufficient to establish Ravetti's incompetence on any of the relevant dates. And, as we have noted, an order appointing a conservator for Ravetti was not signed by Ravetti. Under these circumstances respondent was reasonably entitled to place reliance upon the waivers which were in all respects regular in form. See Hollman v. Commissioner [Dec. 25,4951, 38 T.C. 251, 260 (1962), supplemented by T.C. Memo. 1962-236. At this point the burden of proof was on petitioner to show that the

waivers were invalid. See Goldberg v. Commissioner [Dec. 41,637(M)], T.C. Memo. 1984-617. As demonstrated, petitioner has failed to sustain this burden.

The next issue involves the Harding limited partnership. On his 1976 return Ravetti deducted $48,315 as a loss attributable to his interest in Harding. Respondent contends that petitioner is not entitled to this deduction because a profit motive was lacking on the part of the limited partnership, and the transaction lacked economic substance. We again note that both respondent and petitioner agreed to be bound by Hawley v. Commissioner, [Dec. 44,602(M)], T.C. Memo. 1988-77. Of the four issues decided in Hawley, the one relevant to the instant proceeding is whether the various Cal-Am coal partnerships had a profit motive when they entered into coal leases, and whether the coal lease transactions lacked economic substance. Id.

In deciding this issue in Hawley, we concluded that the primary objective of the Cal-Am partnership was to invest in limited partnerships which would produce tax deductions for the investors; that the partnerships did not engage in coal mining activities, and no coal was ever commercially mined or produced; that there was a lack of arm's-length dealing among the various entities; that the investment prospectus made substantial allusions to the tax benefits of the limited partnerships; that the purchase price paid for the coal mining leases were inflated and could not be supported

by any expected income; that Joseph Laird, who controlled many of the limited partnerships, never made an on-site investigation of the coal reserves; and that the financing involved a circular flow of money. Our ultimate conclusion was that the transactions as well as the partnerships' activities were devoid of economic substance. Id. Since petitioner has agreed to be bound by the findings of fact and conclusions of law in Hawley, we hold for respondent on this issue. Petitioner's argument that Ravetti's state of mind when he made the investment in the Harding partnership precludes a finding of tax avoidance is irrelevant since Ravetti's state of mind when he made the investment is not at issue.

Petitioner argues, in the alternative, that if Ravetti is not entitled to a loss deduction attributable to Harding, section 165 entitles him to a theft loss. Petitioner contends that since Joseph Laird, the promoter of the limited partnerships for Cal Am Corporation, was indicted for securities fraud and filing false tax returns, Ravetti's investment was stolen. Petitioner relies on Nichols v. Commissioner [Dec. 27,2931, T.C. 842 (1965), to support her
INSERT PAGE EIGHT (8) HERE.....:

change in current events, which sharply decreased the public's interest in the subject matter of the film. She concludes by stating "Where the movie is bonafide, losses are allowed."

Petitioner's arguments fail to address respondent's contention that C & M's purchase of the movie lacked a profit motive and economic substance. The fact that the movie itself was made by well-known figures in the entertainment industry has little, if any, bearing on the economic substance of the transactions in which C & M engaged. Put simply, the intent of those who made and produced the movie does not establish that C & M's involvement had economic substance.

In a case such as this we consider both the taxpayer's (here, the partnership's) subjective business motivation and the objective economic substance of the transaction to determine whether the transaction was, in effect, a sham. Casebeer v. Commissioner [90-2 ustc P50,4351,909 F.2d 1360, 1363 (9th Cir. 1990), affg. [Dec. 44,405(M)] on this issue four memorandum opinions of this Court."

There is no evidence that the terms of the purchase here were actually negotiated between C & M and 21st or between Ravetti and C & M. There is no evidence that C & M negotiated with 21st over either the actual terms of the agreement or the purchase price. Instead, the documents reflect a package deal. Thus, while C & M purchased the film rights from 21st for a total price of $1,500,000, the cash amount paid by 21st to acquire the film was only $113,000. The remainder of the purchase price was paid by instruments which could only be realized upon in the unlikely

event that the film proved to be successful beyond reasonable expectations. As above stated, box office receipts totaled only $1,062, and nontheatrical receipts were only $6,740. This particular cinematic venture has all the earmarks of a product which was dead on arrival when the partnership bought it and on which the producers and promoters hoped to salvage their investment by promoting a tax shelter deal. The $113,000 paid by 21st for the film, which was quickly followed by the sale of the film to C & M for an illusory $1,500,000, confirms the probability that such was the case. As in most tax shelters, the bulk of the consideration, consisting of nonrecourse promissory notes, is deferred: specifically, $1,350,000 of the $1,500,000 total. And of this amount, $1,200,000 represented an amount to be paid only out of proceeds received from the film. In addition, C & M funds which were to be used to purchase release prints and advertising were satisfied by notes, renewable indefinitely at 7-year intervals, again payable only out of the film rental proceeds.

The Court may look beyond the paper to find the actual substance and economic realities of a transaction. Forseth v. Commissioner [Dec. 42,265], 85 T.C. 127 (1985), affd. [88-1 ustc P93311 845 F.2d 746 (7th Cir. 1988), affd. sub nom. Enrici v. Commissioner [87-1 ustc P9251], 813 F.2d 293 (9th Cir. 1987), affd. sub nom. Mahoney v. Commissioner [87-1 ustc P], 808 F.2d 1219 (6th Cir. 1987). The nature of the dealings between the parties, the disparity between the

purchase price and the fair market value of the property acquired by Ravetti, and the illusory nature of the financing transaction establish that the transaction lacked economic substance, and that the partnership had no other purpose than tax avoidance.

In summary, we conclude that petitioner has not established that the C & M transactions were bona fide arm's-length transactions at fair market value, that the transactions were entered into for profit, or that the transactions had any economic substance other than the avoidance of taxes.

For the year 1976 respondent determined a $1,451 late filing addition to tax pursuant to section 6651(a). Petitioner has the burden of proof on this issue. Rule 142(a). The sum total of petitioner's response to respondent's determination is contained in the following two sentences: "The simple answer to all of respondent's arguments with respect to additions was the fact that the taxpayer was incompetent. No matter how the Court decides this case, additions should not be allowed."

As previously discussed, petitioner has not established at what point Ravetti may be deemed to have been incompetent to manage his affairs prior to the appointment of a conservator on February 4, 1985. The return in question was due to be filed April 15, 1977, almost eight years earlier. Consequently, we were unable to conclude that petitioner has shown that Ravetti's late filing was due

to reasonable cause and not due to willful neglect, a showing necessitated by the provisions of section 6651(a) to avoid the late filing addition.

We next consider whether petitioner is liable for increased interest pursuant to section 6621(d), as asserted by respondent in an affirmative pleading. Respondent, by reason of having pleaded a new mater, bears the burden of proof on this issue. Rule 142(a). Beyond a cursory assertion that the Cal-Am transactions were shams, respondent does not explicate with specificity the application of section 6621(d) to this case. We decline to attempt to supply the missing links, noting in passing that the question of increased interest was not raised in Hawley. We hold for petitioner on this issue.

To reflect the foregoing, and taking account of the fact that there is no increased deficiency as a result of our ruling with regard to section 6621(d),

Decision will be entered for respondent.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF SILVIO RAVETTI, Deceased, Donna Irene Logan, Executrix,	)	No. 93-70851
Petitioner-Appellant,	)	Tax. Ct. No. 19854-86
V.	)	MEMORANDUM*
COMMISSIONER, INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Appeal From a Decision of the
United States Tax Court

Submitted October 3, 1994**
San Francisco, California
Filed October 11, 1994

Before: GOODWIN, O'SCANNLAIN and KLEINFELD, Circuit Judges.

We affirm the Tax Court summary judgment.

The Estate argues that the notice of deficiency was inadequate under Scar v. Commissioner, 814 F.2d 1363, 1367 (9th Cir. 1987). That is incorrect. The notice sufficed, under our reading of Scar in Kantor v. Commissioner, 998 F.2d 1514, 1521 (9th Cir. 1993). The Scar notice showed on its face that the IRS had not really determined the amount of the deficiency and had issued the notice without even looking at the taxpayer's return. The deficiency notice was based

upon a mining partnership which had nothing to do with the taxpayer's return. The notice of deficiency in the case at bar, like the one in Kantor, sis not show "on its face" that no determination had been made based on the taxpayer's return. The amounts of deductions disallowed corresponded exactly to amounts listed on his 1982 return, and the request for penalties based on tax-motivated investments indicated the reasons for the denial of the deductions.

The Estate's next argument is that assessment and collection were barred because of the pendency of a Tax Court proceeding. But Ravetti had waived his Section 6213(a) right to prevent collection. He signed a stipulation saying so. Now he calls it a "maverick clause buried in a mass of bureaucratic boilerplate." We do not see what would render it ineffective. The waiver in the closing agreement could be avoided for "fraud or malfeasance, or misrepresentation of fact," 26 U.S.C. Section 7121, but none were demonstrated.

Next, the Estate argues for rescission of its stipulation and closing agreement. The ground is not clear. Ravetti's claimed incompetence could not matter, because when they were signed, he was dead.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); 9thCir.R. 34-4.

His argument for lack of consideration could not matter, because lack of consideration is not "fraud or malfeasance, or misrepresentation of material fact " as required by 26 U.S.C. Section 7121. He did not establish any genuine issue of fact as to whether the IRS knew that the Estate was under some misapprehension of fact, so M. F. Kemper v. City of Los Angeles, 235 P.2d 7 (1951), has no bearing on the case at bar.

The Estate's argument that Ravetti's claimed incompetence prevented him from having a tax shelter rather than profit making motivation, and that the IRS improperly anticipated Section 6221, does not matter, because the closing agreement controlled. Even if the deficiency notice had been wrong, once the Estate stipulated to an amount and made a closing agreement, that was the end of it. This is not to suggest that there was any error. Profit-motivation was determined at the partnership level before Congress enacted 26 U.S.C. Section 6221. Wolf v. Commissioner, 4 F.3d 709, 712 (9th Cir. 1993). The Estate did not establish a genuine issue of fact as to whether the Glenstall partnership had a profit motive.

The Estate argues that the Tax Court should have consolidated it cases, but it does not establish denial of consolidation was an abuse of discretion. There were different issues in the different cases.

AFFIRMED.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ESTATE OF SILVIO RAVETTI, DECEASED, DONNA IRENE LOGAN, EXECUTRIX,	)
Petitioner,	)
V.	)
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent.	)

Docket No. 19854-86

ORDER

Background

This was the case was set for trial at the trial session that began on April 19, 1993, in San Francisco, California. Upon appearance at the April 19, 1993 calendar call, respondent moved for entry of decision. Respondent's motion was filed as a motion for summary judgment and petitioner was ordered to respond to such motion on or before May 19, 1993. Petitioner's memorandum in opposition t respondent's motion for summary judgment and her own summary judgment motion was filed, after an extension, on June 21, 1993. In response to petitioner's motion, respondent filed a notice of objection on July 20, 1993. These respective motions for summary judgment will be addressed in a separate order and decision.

On June 16, 1993, respondent issued a notice of levy to petitioner for tax years 1981 and 1982. In response, on July 15, 1993, petitioner filed a motion to restrain assessment and collection under Tax Court Rule 55. A telephonic conference call was held with both parties on July 19, 1993, to discuss petitioner's motion. In that discussion, respondent's counsel called our attention to a closing agreement executed and signed by both parties which contained a waiver by petitioner of the restrictions contained in section 6213(a) prohibiting assessment and collection of deficiencies (Exhibit F attached to petitioner's motion to restrain). Per our discussion, respondent filed an objection to petitioner's motion to restrain with a memorandum of law in support on July 20, 1993. Petitioner replied to respondent's memorandum on July 23, 1993.

In addition, on July 23, 1993, petitioner filed a motion for relief from stipulation alleging respondent had breached the agreement by instituting collection. Respondent filed a notice of objection on July 27, 1993.

Motions for Relief from Stipulation and to Restrain Assessment & Collection

In her motion for relief from stipulation, petitioner requests a rescission of the stipulation of partial agreement, upon which the closing agreement is based. Petitioner alleges that respondent has breached both the closing agreement and the stipulation by instituting collection action while this case is before this Court.

In her motion to restrain, petitioner argues that it was not the intention of the parties, in executing the stipulation of partial agreement and the closing agreement, to waive the restriction on assessment and collection. More specifically, petitioner alleges that a mutual mistake exists in this case and therefore the waiver was invalid. Petitioner claims that she was unaware of the waiver provision upon signing the closing agreement and that respondent similarly did not intend that the waiver be included. In the alternative petitioner asserts that a unilateral mistake exists on her part and therefore, respondent should not be allowed to profit from "the cleverness of its representatives."

Conversely, respondent argues that petitioner voluntarily entered into the written agreements at issue. Respondent contends that she did intend to include the waiver provision, thus negating the possibility of a mutual mistake. Furthermore, respondent contends that if petitioner made a unilateral mistake in executing the agreements, it is not adequate grounds for rescission. Therefore, respondent concludes that her assessment of tax and collection efforts are proper and in accordance with those agreements.

Respondent has assessed the deficiencies in tax and undertaken collection actions for tax years 1981 and 1982. Pursuant to section 6213(a), we have jurisdiction only over petitioner's motion insofar as it relates to tax year 1982. See Kamholz v. Commissioner, 94 T.C. 11 (1990).

The waiver, as contained in the closing agreement executed and signed by both parties, reads:

9. The parties agree that with respect to any deficiencies in income tax attributable to the items set forth in paragraphs 1 through 8 above:

a. The taxpayers waive the restrictions contained in Section 6213(a) prohibiting assessment and collection of the deficiencies (plus statutory interest); and

b. The taxpayers waive, pursuant to Section 6224(b), the restrictions contained in Section 6225(a) prohibiting the assessment and collection of deficiencies (plus statutory interest) to the extent that these items are subject to the provisions of Section 6221 through Section 6233, including those items which become non-partnership items pursuant to Section 6231(b)(1)(C) by the execution of this closing agreement by both parties. [emphasis in original]

In both the closing agreement and the stipulation of partial agreement, the parties resolved issues related to petitioner's investment in Glenstall Petroleum. For tax year 1982, petitioner conceded that 100 percent of the deficiency was attributable to her investment in the Oil and Gas Partnership. Furthermore, petitioner conceded liability under section 6621(c) for additional interest on substantial underpayments attributable to tax-motivated transactions. Respondent conceded that no additions to tax would be imposed under sections 6653(a), 6659, or 6661.

The executed closing agreement and partial stipulation were mailed to respondent's counsel with a cover later dated August 17, 1992, by petitioner's counsel, Richard H. Foster. We assume Mr. Foster read the agreement and advised petitioner to sign it. Both Mr.Foster and petitioner signed the partial stipulation filed with the Court on August 28, 1992. The closing agreement was executed by petitioner on July 27, 1992, and by respondent on September 23, 1992.

When interpreting an agreement, the Court cannot ignore the plain language of the written document. Although the intention of the parties is foremost, the outward manifestations of those intentions is controlling. Superior Oil Co. v. Western Slope Gas Co., 604 E.2d 1281, 1289 (10th Cir. 1979) (citing Quad Const., inc. v. Wm. A Smith Contracting Co., 534 E.2d 1391, 1394 (10th Cir. 1976).

Under California law, even if the written agreement of the parties is clear and unambiguous on its face, the trial judge must consider relevant extrinsic evidence that can prove a meaning to which the language of the contract is not reasonably susceptible. However, if after considering extrinsic evidence the Court finds the language of the contract is not reasonably susceptible to the asserted interpretation and is unambiguous, extrinsic evidence cannot be received for the purpose of varying the terms of the contract. The Court must look to the objective, rather than subjective, criteria in determining the intent of the parties. U.S. v. King

Features Entertainment, Inc., 843 F.2d 394,398 (9th Cir. 1988) (citing Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 871-873 (9th Cir. 1979)). In the absence of fraud or mutual mistake, any attempt to assert a prior unilateral and private intention is foreclosed because the subjective, unexpressed and uncommunicated intentions of a party to the contract are inconsequential. United California Bank v. THC Financial Corp., 557 F.2d 1351, 1360 (9th Cir. 1977) (citing Union Bank v. Winnebago Indus., Inc., 528 F.2d 95, 99 (9th Cir 1975).

It is well establised that if a petition has been filed with the Tax Court, no assessment of a deficiency in tax or levy for its collection may be made until the decision of the Tax Court has become final. Sec. 6213(a); Kamholz v. Commissioner, supra at 15. However, section 6213(d) provides an exception to this general rule:

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided for in subsection (a) [section 6213(a)] on the assessment and collection of the whole or any part of the deficiency.

The purpose of section 6213 (d) is to permit the taxpayer to pay his taxes and to permit the Government to get its money without delay. Moore v. Cleveland Ry. Co., 108 F.2d 656,659 (6th Cir. 1940). A taxpayer's waiver of the prohibition against assessment or collection until the finality of the Tax

Court decision authorizes respondent to assess the tax immediately. United States v. Price, 361 U.S. 304 (1960); Pesko v. United States, 918 F.2d 1581 (Fed. Cir. 1990). Immediate payment may benefit the taxpayer as well as the government because it stops the running of interest.

A waiver cannot be withdrawn, once acted upon, and assessment is made in accordance with its terms. Sec. 301.6213-1(d), Income Tax Regs. A waiver executed under a unilateral mistake of fact by the taxpayer cannot be set aside in absence of fraud or duress. Quigley v. Internal Revenue Service, 289 F.2d 878, 880 n.5 (D.C. Cir. 1960). Similarly, "one cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained." G. L. Webster Co. v. Trinidad Bean & Elevator Co., 92 F.2d 177, 179 (4th Cir. 1937).

Moreover, closing agreements are binding on the parties as to the terms agreed upon, including waiver provisions, and may not be annulled, modified, set aside or disregarded in any suit or proceeding unless there is a showing of fraud, malfeasance, or misrepresentation of material fact. Sec. 7121(b); Estate of Magarian v. Commissioner, 97 T.C. 1, 5-6 (1991) (citing Zaentz v. Commissioner, 90 T.C. 753, 760-761 (1988).

In accordance, we find from examination of the closing agreement and the stipulation of partial agreement, and the arguments advanced by the parties

that the intention of the parties, upon execution, was to include the waiver agreement in the document. The language of these agreements, specifically the waiver provision, is not ambiguous. Because the agreements are unambiguous in their faces, evidence of petitioner's mistake cannot be admitted to vary the terms of either agreement. U.S. v. King Features Entertainment, Inc., supra. Because petitioner has failed to prove that her alleged unilateral mistake of fact was due to fraud, duress, or misrepresentation by respondent, we find her bound by the waiver provision and the remaining terms in both agreements. Her mere failure to become acquainted with an agreement which she signed is not adequate grounds to rescind or reform the agreement. Quigley v. Internal Revenue Service, supra. Therefore, we conclude that respondent's notice of levy and any collection efforts pursuant to that notice are valid under section 6213(d) and do not constitute a breach of either agreement.

In accordance, it is

ORDERED that petitioner's motion for relief from stipulation is denied. It is further

ORDERED that petitioner's motion to restrain assessment and collection under Tax Court Rule 55 is similarly denied. Respondent's issuance of a Notice of Levy was proper under section 6213(d).

Carolyn Miller Parr
Judge

T.C. Memo. 1993-418

UNITED STATES TAX COURT

ESTATE OF SILVIO RAVETTI, DECEASED, DONNA LOGAN, EXECUTRIX, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 19854-86.
Filed September 13, 1993

Richard H. Foster, for petitioner.

Paul J. Krug and Lamont R. Olson, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

PARR, Judge: Respondent determined a deficiency in and additions to petitioner's Federal income tax, as well as additional interest, as follows:

		Additions to Tax & Additional Interest		
Year	Deficiency	Sec. 6653(a)(1)	Sec. 6653(a)(2)	
1982	$30,009	$1,500.45	1	
		Sec. 6621(c)	Sec. 6661	
		2	$3,000.50	

1 50 percent of the interest due on $30,009.
2 120 percent of the interest due on the deficiency for the taxable year.

This case is presently before the Court on cross motions for summary judgment pursuant to Rule 121. Respondent seeks summary judgment , contending that

the only remaining issue in this case involves a dispute over the statute of limitations. Consequently, respondent argues that petitioner is liable for the deficiency in income tax for 1982, additions to tax, and additional interest under section 6621(c).

Petitioner's motion for summary judgment and supporting memorandum contend that the notice of deficiency is invalid because it was issued prior to completion of the examination of the partnership return, and that the decedent suffered from Alzheimer's Disease, providing a defense to the deficiency, additions to tax, and additional interest, and consequently entitling petitioner to summary judgment.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts is incorporated herein by its reference. At the time the petition in this case was filed, Silvio Ravetti was alive and residing in Alamo, California.

Mr. Ravetti (hereinafter sometimes referred to as decedent) was admitted to McAuley Neuropsychiatric Institute at St. Mary's Hospital in San Francisco, California, on or about November 10, 1980. The decedent was admitted to the institute for neuropsychiatric investigation for increased activity, pressured speech, and hypersexuality. He was discharged from the institute on or about December 5, 1980.

On February 4, 1985, Raymond N. Bolton was appointed conservator of Mr. Ravetti's estate. Mr. Ravetti died on

June 9, 1986. On August 4, 1986, Donna Logan, Mr. Ravetti's daughter, was appointed executrix for his estate.

On April 4, 1986, respondent issued petitioner a notice of deficiency for taxable year 1982.

In a joint stipulation of partial agreement filed August 28, 1992, petitioner concedes 100 percent of the deficiency for tax year 1982 attributable to the full disallowance of all of petitioner's deductions and/or credits with respect to petitioner's investment in Glenstall Petroleum, LTD (hereinafter the Oil and Gas Partnership or simply the partnership). In addition, on September 23, 1992, the parties entered into a closing agreement to the same effect pursuant to section 7121.

In both agreements, respondent conceded that the additions to tax provided for in sections 6653(a) and 6661 do not apply to any deficiency attributable to petitioner's participation in the partnership. Additionally, in both agreements, petitioner conceded that the deficiency for hte tax year 1982 would bear statutory interest at the rate imposed by section 6621(c) with respect to interest accruing after December 31, 1984. Both agreements state:

> This agreement is solely intended to resolve the question of the amount of deductions to which petitioner is entitled form the GLENSTALL PETROLEUM partnership but does not affect the deficiency resulting from the adjustment to said partnership.
>
> Respondent reserves the right to

object to the raising of any issues by petitioner not previously pleaded.

Accordingly, the parties stipulated to the deductions and credits with respect to Mr. Ravetti's (petitioner's) investment in the partnership, as follows:

(1) Partnership losses in the amount of $37,571;

(2) Investment tax credit in the amount of $428; and

(3) Investment interest expense in the amount of $21,833.

Al of the additions to tax and the additional interest determined in respondent's notice of deficiency relate to petitioner's investment in the partnership.

OPINION

A motion for summary judgement should be granted under Rule 121(b) only if the record establishes that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to show that no issue of material fact exists. We view the evidence in the light most favorable to the moving party. Blanton v. Commissioner, 94 T.C. 491, 494 (1990); Naftel v. Commissioner, 85 T.C. 527, 529 (1985); Jacklin v. Comissioner, 79 T.C. 340, 344 (1982). A motion for summary judgment will be denied if thee is any reasonable doubt as to the facts at issue. Hoeme v. Commissioner, 63 T.C. 18, 20 (1974).

Applying these standards to the

facts at issue and in a manner most favorable to the moving party, we conclude that as to respondent's motion for summary judgment, respondent has met her burden of proving that no genuine issue of material fact remains in existence and section 661 for substantial understatement of tax liability, which respondent conceded in prior agreements. In addition, we will grant summary judgment in favor of respondent as to the deficiency and additional interest under section 6621(c) on substantial underpayments attributable to tax-motivated transactions, both of which petitioner conceded in the stipulation and closing agreement.[3](3).

We note that in the closing agreement as well as the stipulation of partial agreement, petitioner conceded 100 percent of the deficiency attributable to its investment in the Oil and Gas Partnership and additional interest on that deficiency under section 6621(c). It is well established that closing agreements are binding on the parties as to terms agreed upon and may not be annulled, modified, set aside, or disregarded in any suit or proceeding unless there is a showing of fraud, malfeasance, or misrepresentation of material fact. Sec. 7121(b); Estate of Magarian v. Commissioner, 97 T.C. 1, 5-6 (1991)). Because petitioner has not proven fraud or misrepresentation on the

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[3] (3) In our order entered August 5, 1993, we denied petitioner's motion to be relieved from the stipulation of partial agreement and from the waiver, under section 6213(d), contained in the closing agreement.

part of respondent, we hold petitioner bound by the closing agreement.

We turn now to the statute of limitations issue. The notice of deficiency was issued on April 4, 1986, less than three years after the due date of the 1982 tax return. However, petitioner contends that the notice was invalid because of lack of prior determination by respondent.

In asserting that the notice of deficiency was issued prior to a factual determination by respondent and thus invalid, petitioner relies on Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987), revg. 81 T.C. 855 (1983). However, that decision can be distinguished from the case at hand. In Scar, respondent issued a notice of deficiency determining a deficiency of $96,600 and disallowing certain deductions that respondent stated the taxpayers had taken as participants in a mining project. The Court of Appeals for the Ninth Circuit found that it was clear from the face of the notice that respondent had determined the deficiency without examining the taxpayer's return, since the taxpayers had never participated in any mining project. Id. Clearly, no such circumstances are present in the case at hand. Indeed the stipulated agreements entered into concerning decedent's involvement in the partnership and distributions received therefrom clearly reflect that the notice of deficiency had a basis in reality.

Moreover, the Ninth Circuit in Scar reenunciated the general rule that courts will not "look behind a deficiency notice to question the Commissioner's motives

and procedures leading to a determination." Id. at 1368 (citing Riland v. Commissioner, 875 F.2d 1396, 1400 (9th Cir. 1989). Furthermore, where the notice of deficiency does not, on its face, reveal the Commissioner's failure to make a determination, the taxpayer bears the burden of showing no determination was made. Campbel v. Comissioner, 90 T.C. 110, 114 (1988). Since the face of the notice does not indicate that respondent failed to make a determination, and sine petitioner failed to prove that a determination was not made, we hold the notice of deficiency to be valid.

Petitioner acknowledges that a stipulation of partial agreement was fled in this case. However, petitioner argues that the stipulation was made on the basis that special defenses unique to the estate would be allowed. Petitioner argues, both in its opposition to respondent's motion and in its own summary judgment motion, that decedent's mental state and competency (allegedly, Alzheimer's Disease) is a crucial fact in this case. Petitioner attached the opinion of decedent's treating psychiatrist, Dr. Stephen Krause, which petitioner states was stipulated to by respondent.

Petitioner further claims that in order for respondent to prevail on her motion for summary judgment, respondent must prove that there was a lack of profit objectives by the general partner(s) of the partnership. Therefore, decedent's mental competency

becomes a crucial issue.[4] Conversely, respondent contends that Silvio Ravetti's mental competency is not relevant to the partnership issues involved in this case, because those issues have been settled by agreement between the parties.

We agree with respondent. Nevertheless, we will address petitioner's contention for the sake of completeness.

It is well established that the determination of whether a partnership is engaged in a trade or business or in an activity with the requisite profit objective is made at the partnership level. Fox v. Commissioner, 80 T.C. 972 (1982), affd. without published opinion 742 F.2d 1441 (2d Cir. 1984); Brannen v. Commissioner, 78 T.C. 471, 503-505 (1982), affd. 722 F.2d 695 (11th Cir. 1984). Petitioner seems to be arguing that decedent's mental state prevented him from having the requisite profit objective. If correct, petitioner would nevertheless lose because, to fall

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[4] (4) Petitioner argues that the decedent's mental incompetency, due to Alzheimer's Disease, precludes the imposition of the additions to tax. We note that, in some instances, a taxpayer's mental competency can relieve him of liability for additions to tax. See Williams v. Commissioner, 16 T.C. 893 (1951) (illness or incapacity may constitute reasonable cause if taxpayer establishes he was so ill as to be unable to file); Harbour v. Commissioner, T.C. Memo. 1991-532 (incapacitation was reasonable cause, therefore, taxpayer not liable for negligence); Jone v. Commissioner, T.C. Memo. 1988-542 (taxpayer found not liable for negligence because of extended period of disability).

outside section 183 (deductions from an activity "not engaged in for profit"), petitioner must prove that the general partner engaged in activities in issue with an actual and honest profit objective. Dreicer v. Comissioner, 78 T.C. 642, 645 (1982), affd. without opinion 702 F.2d 1205 (D.C. Cir. 1983). Petitioner misunderstands both who has the burden (petitioner) and what must be shown.

Petitioner failed to meet its burden of proof that the general partner(s) in the partnership possessed the necessary profit objective. See BJR Corp. v. Commissioner, 67 T.C. 111, 130 (1976). Petitioner never clearly established whether the decedent was a general or limited partner in the partnership. If the decedent was a limited partner, we note that, in a limited partnership, the activities of the general partner(s) determine whether the partners have engaged in an activity for profit. Fox v. Commissioner, supra at 1008. Therefore, the decedent's mental competency or lack thereof is neither relevant nor determinative. See Estate of Ravetti v. Commissioner, T.C. Memo. 1993-343 (involving tax years 1976-1978).

Even if we somehow took into account petitioner's lack of mental capacity in making the investment, our determination would remain unchanged. Petitioner has failed to otherwise prove the allowability of the partnership deductions. Specifically, no evidence regarding the profit objective of the general partner was offered.

Moreover, this case involves tax year 1982, but the decedent was not declared incompetent until 1985. We have no evidence of his mental capacity in 1982.

To reflect the foregoing,

An appropriate order and decision will be entered denying petitioner's motion for summary judgment and granting summary judgment in favor of respondent as to the deficiency, the additions to tax under sections 6653(a) and 6661, and additional interest under section 6621(c).